

LEY

V.

O'HAGAN AND OTHERS

REASONS FOR JUDGMENT

Oral

Judgment delivered at Sydney

on Friday, 21st August 1970

LEY

v.

O'HAGAN AND OTHERS

ORDER

Appeal dismissed with costs.

LEY

v.

O'HAGAN AND OTHERS

JUDGMENT

(ORAL)

BARWICK C.J.

LEY

v.

O'HAGAN AND OTHERS

The appellant has at this stage asked that his appeal be dismissed and that there be no order as to costs. The hearing of the appeal has occupied all day yesterday and up to this point today. We will accede to the application that the matter be dismissed at the request of the appellant, but I would like to say that I consider this a wise course because, in my opinion, there was no foundation at all for the appeal. I would like to say something about that matter.

As ultimately constituted, after amendment, this was a suit by which the respondent company sued mortgagees, who are the respondents O'Hagan, to restrain them from carrying out a contract by which land mortgaged by that respondent to those mortgagees was sold to the purchaser, who is a defendant in the suit and is now a respondent in this appeal; and also to obtain redemption of the mortgaged land. The sole basis of the claim to such an injunction was that the sale had been made by the mortgagees in exercise of their power of sale on default in disregard of the mortgagor's rights and interests at a gross under value and that the purchaser was aware of that circumstance.

During the hearing of the suit before the learned judge in Equity the appellant, who is the principal executive

officer of the respondent company, was removed from the suit as a plaintiff and joined as a defendant. In a statement of defence he claimed that he was entitled to redeem the mortgaged land as an assignee from the respondent company of its equity of redemption. The critical question, therefore, in the suit was whether the sale price of \$9,000 for the land in question was grossly under the then market value of that land.

On this question the trial judge had the benefit of opinions expressed by four valuers, all qualified to speak as to the market value of the land, each of whom gave evidence, each was cross-examined and some of them, as well, supplied written valuations. The experts differed considerably in their opinions. The trial judge, however, who saw and heard them, accepted the evidence of those whose valuations were not greater than the sale price. In fact three out of four valuers were of that opinion.

There was no tender by the mortgagor to the mortgagee of the amount of the mortgage debt before the making of the contract of the sale. A claim that the mortgagees had expressly agreed not to exercise their rights arising on default was dismissed by the primary judge. He thought there was no evidence of it and I agree that there was none.

The appellant also claimed that the mortgagees, by their conduct, had misled the mortgagor into allowing the mortgage to fall into arrear and that the mortgagor had acted upon this to its detriment by not attempting to pay the accruing interest. This claim to what is said to be an estoppel appears

to have been founded on the conduct of a solicitor acting for both parties. But, whatever might be said as to what occurred in that period (and I express no opinion on that matter) clearly enough, when a separate solicitor began to act for the mortgagee, a demand for payment was made on the mortgagors. It was not responded to. There could be no basis in that period for saying that there was any representation or any misleading or any acting to the detriment of the mortgagor based upon any relevant conduct of the mortgagees.

The primary judge, who was of these opinions, dismissed the suit. The question of redemption in that case did not arise because the mortgagees had properly exercised their power of sale and become bound to the purchaser.

An appeal to the Court of Appeal Division of the Supreme Court was dismissed. We have heard the appellant in person. He has criticised the evidence of the valuers which the trial judge accepted, pointing to various factual considerations which he claimed destroyed the acceptability of that evidence. I find no need to canvass in detail the matters raised by the appellant. He was given adequate opportunity to place the relevant matters before us and I thought he did so with considerable clarity. It is sufficient to say that I do not find anything in what the appellant has said or in any of the material to which he has drawn our attention to lead me in the least to doubt the propriety of the trial judge's conclusion as to the relation of the sale price and the market value of the land. His Honour in a clearly and carefully expressed judgment has given his reasons for the opinion to which he

came. In my opinion he took into consideration all the evidence which was material to the resolution of the critical question in the case. Where there was any relevant conflict, his Honour fully stated the evidence which he accepted and his reasons for doing so.

Having regard to the facts which his Honour has found, I can see no error of law in his judgment. Further, I find no reason why any of his findings of fact should be disturbed. The Court of Appeal came to the same conclusions and, in my opinion, they were right.

The appeal will be dismissed at the request of the appellant but I have thought it proper to express briefly my reasons for saying that this was a wise course of action on his part, thus saving any further costs.

In my opinion, there is no reason why the appellant should not pay the respondent's costs of the appeal.

LEY

v.

O'HAGAN AND OTHERS

JUDGMENT  
(ORAL)

McTIERNAN J.



LEY

v.

O'HAGAN AND OTHERS

I am entirely of the same opinion as the  
Chief Justice.

LEY

v.

O'HAGAN AND OTHERS

JUDGMENT  
(ORAL)

MENZIES J.

LEY

v.

O'HAGAN AND OTHERS

I think this Court should accede to the appellant's application that his appeal be dismissed. I think this Court should reject the appellant's application that matters of costs should be further deferred. I consider that the appeal should be dismissed with costs, and I would add that I have heard nothing which causes me to doubt the correctness of the decisions from which the appellant has appealed.

LEY

v.

O'HAGAN AND OTHERS

JUDGMENT  
(ORAL)

WINDEYER J.

LEY

v.

O'HAGAN AND OTHERS

I agree.

LEY

v.

O'HAGAN AND OTHERS

JUDGMENT  
(ORAL)

OWEN J.

LEY

v.

O'HAGAN AND OTHERS

I agree.